Yeargin Construction Co., Inc. *and* International Brotherhood of Electrical Workers, Local 278, AFL-CIO. Case 23-CA-9180

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 6 October 1983 Administrative Law Judge William A. Gershuny issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Yeargin Construction Company, Inc., Corpus Christi, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We do note, as contended by the General Counsel, that the judge did not fully articulate the basis for many of the credibility resolutions. We find, however, that the judge's conclusions are supported by the record.

[2] Member Zimmerman would find that the Respondent unlawfully threatened employee Gene Young when General Foreman E. Jarrles admittedly told Young that wearing a union badge "may be hazardous to his health." Such a statement is an unmistakable threat. The Respondent's proffered explanation that the statement was made for the employee's benefit is unworthy of belief. In any case, the explanation is irrelevant since it was not disclosed to the employee at the time the threatening statement was made.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge. A hearing was held in Corpus Christi, Texas on July 6 and 7, 1983, on complaint of May 16, 1983, as amended, alleging principally the unlawful discharge of three journeymen electricians in December 1982 during an organizational campaign.

On the entire record, including my observation of witness demeanor, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that Respondent is an employer subject to the Act and that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *Background*

In the fall of 1982, Respondent, a South Carolina general contractor, was engaged in the construction of a refinery in Corpus Christi, Texas, employing as many as 1975 electricians, plumbers, helpers, and other employees from other building trades. The uncontroverted evidence is that, at time of hiring, applicants were not asked if they were union members or adherents; that one known union member was told by at least one supervisor that Respondent was hiring; that known union members were employed; that some IBEW members (1) wore decals or other identification and (2) gave hand signals to supervisors signifying their union membership; and that, following South Texas Building and Trades Department sponsored picketing which commenced on the morning of December 7, 1982, at which time 71 employees left and remained off the job, all employed who reapplied and appeared for work were rehired.

On December 2, journeyman electrician Ynclan was terminated for non-production and on December 6 journeymen electricians Shake and Young were terminated for failing to do assigned work. During 1982, 110 other employees were discharged for similar reasons, including two other electricians, Lopez and Gamez, who were included in the unfair labor practice charge, but not in the complaint, and who gave damaging testimony at the hearing to Respondent.[1]

There is no evidence of unfair labor practices committed by Respondent against any union members other than IBEW members or any union supporter who refused to cross the picket line which was established on December 7. And, finally, there is no evidence of union animus on Respondent's part prior to the events which are the subject of this complaint.

B. *Credibility*

Because the General Counsel's case rests almost exclusively on the testimony of the five discharged employees named in the charge (only three of whom are named discriminatees in the complaint) and because very serious questions are raised on this record as to the reliability of that testimony, the credibility issues must be addressed at the outset.

Technician Noe Lopez testified as to many of the 8(a)(1) violations alleged in paragraph 12 of the complaint to have been committed by his supervisor, Moody,

[1] The General Counsel's posthearing motion to reject R. Exh. 6 which was admitted into evidence at the hearing is denied. Each of the 110 termination slips is a properly authenticated business record and bears relevance to the issue of motive.

who also was an IBEW member at the time. His testimony of threats of discharge for card distribution and for demonstrating an IBEW decal, contradicted in whole by Moody, was simply unconvincing based on my observation of his demeanor and, further, was rendered highly implausible by other undisputed facts: he did not remove the decal and was not denied entry to the jobsite and others freely passed out cards (even to at least one supervisor) without discipline. On the other hand, Moody, an IBEW member, was a very candid and convincing witness, who, I find, was threatened by discriminatee Young ("We'll get your ass in one way or another") for discharging Lopez and was thereafter the subject of intra-union charges seeking a $5000 fine for firing a brother, not cooperating with the IBEW organizational effort and not honoring the picket line.

Journeyman electrician Gamez, similarly, was an unconvincing witness, testifying that a supervisor asked him numerous times if he were a union member, despite the admitted fact that he wore union emblems and insignia on the jobsite. Moro, whose testimony I credit, based on his demeanor on the witness stand, denied such an interrogation, stating that, seeing the union emblems, he knew all the time Gamez was a union member.

Discriminatee Ynclan, a technician who openly displayed his union decals on the jobsite, testified in support of a number of 8(a)(1) allegations of unlawful interrogation and threats by Moody, who was not his supervisor, and who denied any such conduct. As stated above, I credit Moody's testimony in its entirely. Moreover, Ynclan's testimony as to the events surrounding his discharge on December 2 was contradicted not only by his supervisor, Felipe Galvan, but also by two disinterested coemployees whose testimony I found to be candid and convincing. Helper Ramirez, with a degree in electrical engineering and no longer employed by Respondent, worked for Ynclan and other journeymen in the crew and testified, without objection, that others performed twice the work of Ynclan and that Ynclan told him he wanted to quit but would wait until Respondent fired him. Welder Satones, no longer employed by Respondent, similarly testified that Ynclan frequently drank coffee and ate tacos on the job and kept him waiting to perform his welding duties and that Ynclan talked "all the time" about wanting to be fired. Supervisor Galvan's testimony, supported by that of Ramirez and Satones, similarly was consistent and convincing, based on my observation of his demeanor.

And, finally, I reject in its entirety the testimony of discriminatees Young and Shake who were discharged on December 6 for refusing to perform any work. Wholly apart from the fact that it was contradicted in every respect by Supervisor J. Jarrels (who impressed me as an honest, serious-minded electrician bent on supervising his crew with minimum of direct intervention), the testimony of the two discriminatees was contradicted by helper Grace Salinas, a member of USW and a particularly straightforward witness, with no apparent motive to relate anything other than what she in fact heard and observed on the day the two were discharged. She testified that she was assigned to assist Young and Shake on the cooling tower, that they never appeared on the job, that rather they stood around below the tower doing nothing, that she told Shake he would get fired if he did nothing and that Shake replied, "That's what I want." It should be noted that each received unemployment compensation chargeable against a former employer-contractor, that each knew that they would be unemployed the following day in any event, because of a preplanned building trades council picket line which they would not be able to cross if they wished to retain the rights and privileges of their IBEW membership (Moody was charged a $1000 fine for crossing that line even though he was a supervisor), and that Young did not refute Moody's testimony as to the former's threat ("We'll get your ass one way or another").

These credibility resolutions necessarily dispose of the 8(a)(1) allegations of paragraphs 8, 11 and 12(a)–(g) of the complaint which will be dismissed for want of proof. The remaining 8(a)(1) and (3) allegations are discussed below.

C. *The Statement of General Foreman E. Jarrels*

Paragraph 9 of the complaint alleges that Jarrels, father of Electrical Foreman J. Jarrels and a supervisor who had no direct authority over any of the electrical employees on the job, told journeyman electrician Young on the morning of his discharge that wearing a union badge "may be hazardous to his health." Jarrels admitted making that statement, explaining that the two happened to pass on a plant road, that he noticed the union button, that he made the statement for Young's own benefit since other employees on the jobsite were known to be upset with the union activity on the site might be provoked into a physical confrontation with coemployees, that Young "flared off the handle" and that he, Jarrels, said no more and left. Electrical Foreman J. Jarrels, who was present, assured Young that his father did not threaten him, but rather was looking out for Young's interest. For reasons set forth earlier, the testimony of Young is rejected as lacking in credibility.

Tested objectively, the statement does not constitute an unlawful threat or statement and paragraph 9 of the complaint is dismissed. Against a backdrop of widespread knowledge among all employees that concerted picketing (which could threaten continuation of the project) would soon occur, fear among nonunion employees that their jobs might be in jeopardy if the several building trade unions were recognized, and evidence that the pros and cons of the union activity were a subject of continuing discussion among the employees, Jarrel's "hazardous to your health" statement takes on a truly innocuous character. When it is further observed that the organizing activity occurred virtually without interference from Respondent, the statement loses any of the traditional criteria of violative language—it could not have been reasonably construed by any employee on that jobsite as a threat or suggestion of physical or economic harm by Respondent based on the wearing of union insignia or knowledge of union membership. Indeed, Young's reaction stands as either an unthinking reflex action or an exaggerated one, designed to support anticipated unfair labor practice proceedings over the earlier

discharges of IBEW members and the expected discharges of Shake and himself.

D. *The Alleged Interrogation by Electrical Foreman Moro*

In support of paragraph 7 of the complaint, journeyman electrician Mendez, an IBEW member, testified that in mid-November when he first was employed, Electrical Foreman Moro asked if he were a union member, for how long, and why; that he did not reply; that he wore a belt with a union buckle; and that, later, Moro showed him a document instructing supervisors not to interfere with union activities or to give union members a "hard time." Moro denied making such an inquiry, adding that he saw the union insignia and assumed Mendez was a union member. As stated above, I credit the denial. It is not very likely that an employee who publicly displays his union insignia on a jobsite in the midst of an organizing campaign will find himself queried by his employer about his union sympathies. This paragraph of the complaint is dismissed.

E. *The Statements of Safety Director Culler*

Paragraphs 10 and 15 of the complaint allege that, before the start of the shift on December 6, Safety Director Culler ordered Young and Shake not to distribute handbills and told them continued handbilling could cost them their jobs. Culler, called by Respondent to testify, admitted telling two employees that morning they could not pass out union literature and testified further that he took no names or badge numbers; that he did not threaten loss of jobs; that he made no other effort to stop the handbilling, which, in fact, continued unmolested; that he took this action on his own and was not acting on instructions from a supervisor; and that he reported the handbilling activity to his superior, Project Manager Godbee, without comment and left the scene with no further involvement.

As stated earlier, I reject the testimony of Young and Shake in its entirety. The General Counsel called no other witness to testify as to this occurrence, despite the admission of Young that a number of other employees also participated in the handbilling.

While, technically, the General Counsel failed to establish a prima facie case as to these allegations at the conclusion of his case-in-chief, I nevertheless find that Respondent violated Section 8(a)(1) of the Act based on the admissions of Culler. Respondent's published no-solicitation/no-distribution rule did not prohibit the distribution of material by employees prior to the start of the shift in or near the area where employees check in. Culler's actions not only were contrary to that policy, but were unlawful as well, amounting to the promulgation and selective enforcement of an overly broad no-distribution rule. This is so, despite the evident fact that Culler's actions were not motivated by an unlawful purpose, and the further fact that the action was an isolated one, engaged in by an official whose duties did not encompass enforcement of the rule.

F. *The Threat of Moody*

In support of paragraph 12(h) of the complaint, journeyman electrician Oliviera testified that, during a conversation between Young and electrical foreman Moody, the latter stated, "If I had my way, I'd fire all union electricians." Moody denied making any such statement. As previously stated, Young's testimony is rejected in its entirely, his threat to "get" Moody is uncontroverted, Moody's testimony is credited, supervisors admittedly received written instructions not to interfere with union activites or give union members a "hard time," and there is no evidence of general union animosity on the part of Respondent. I can only conclude that Oliviera's testimony as to this Young/Moody conversation is inaccurate and, accordingly, paragraph 12(h) of the complaint is dismissed.

G. *The Discharges of Ynclan, Shake, and Young*

The *credible* evidence is that Ynclan was discharged on December 2, 1982, for lack of production after 2-1/2 months on the job. He wore union decals, talked with other employees about the Union, and passed out authorization cards in October. Two disinterested coemployees testified (see sec. II,B, above) that other journeymen electricians performed twice the work of Ynclan, that Ynclan loafed on the job, that he kept the welder waiting to perform his work, and that he continually talked about wanting to get fired. This last fact takes on added significance when it is remembered that preannounced building trades picketing activity was scheduled for the following week. In addition, Ynclan had received an oral warning on Monday, November 29 (the day he returned from sick leave), based on his performance on his last work day before entering the hospital. During the week of November 29, Ynclan "seemed to be stalling" and got little work done. When told by Foreman Galvan of the reason for his discharge, Ynclan made no protest, replying only, "Oh." On this record, I am unable to find and conclude that Ynclan's union membership or union activities played any role whatever in the discharge decision. That decision, I find, was based solely and exclusively on Foreman Galvan's perception of Ynclan as a nonproductive employee and was not unlawful.

Journeymen electricians Shake and Young were discharged on December 6, the day they engaged in handbilling (prior to the shift and, again, at lunch). Apart from the timing, there is no credible evidence to support the General Counsel's contention that the discharges were unlawful. Indeed, even the timing is suggestive of quite another motive—that of Shake and Young in getting themselves discharged (and eligible for unemployment compensation chargeable against another former employer) prior to the picketing activities scheduled for that week. The credible evidence is that both Shake and Young engineered their discharges on December 6 by deliberately refusing to perform any assigned work. I find and conclude that their union membership, their union activities, in general, and their handbilling activities, in particular, played no role whatever in the discharge decision. That decision, like the 100-plus other similar discharges by Respondent in 1982, was based

solely and exclusively on Young and Shake's refusal to perform work on December 6.

The *credible* evidence (see sec. II,B, above) is that both were assigned that day to work on the cooling tower with helper Grace Salinas, a member of another union; that they never appeared at the job location, but rather were seen at the base of the tower doing nothing; that Salinas told Shake he would be fired if he did nothing; that Shake replied, "That's what I want"; and that foreman E. Jarrel talked to them in vain a number of times during the day about starting their work. Moreover, Jarrel's credibility is unaffected by the fact that a reprimand which he gave Young earlier that day for "standing around and talking" later was modified by checking a block entitled "loafing on the job" or by the further fact that an earlier reprimand issued to Shake on November 18 for "taking too long to do a job" also was modified by adding the words, "Doing work without referring to detail or me." Jarrel's explanation as to the latter (it was the first reprimand he issued and his foreman told him to add additional explanatory language) is reasonable. But, most importantly, neither addition detracted in any way from the underlying reasons for the reprimands.

Paragraphs 16 and 17 of the complaint must be dismissed.

REMEDY

Having found that Respondent has violated the Act in one respect, I will order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Yeargin Construction Company, Inc., Corpus Christi, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from enforcing or threatening to enforce a published company no-solicitation/no-distribution rule so as to prevent or interfere with the distribution of union literature by employees prior to the start of a work shift in or near areas where employees check in for work.

2. Post at its location copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT enforce or threaten to enforce a published company no-solicitation/no-distribution rule so as to prevent or interfere with the distribution of union literature by employees prior to the start of a work shift in or near areas where employees check in for work.

YEARGIN CONSTRUCTION COMPANY, INC.